90-305

No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1989

LAWRENCE S. KRAIN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Does due process require recusal of appellate court judges who are in pending litigation with a person whose appeal is before them?

2. Does due process prohibit a guilty plea to a time-barred criminal charge when the statute of limitations is jurisdictional and cannot be waived?

PARTIES TO THE PROCEEDINGS

Petitioner Lawrence S. Krain was appellant before the Supreme Court of the State of California. Respondent before this Court, the People of the State of California, was appellee below and commenced the prosecution against Petitioner.

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PRAYER

Petitioner Lawrence S. Krain respectfully prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of The State of California entered in this case on June 27, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California is not published in the official reporters; the court's opinion denying review and denying request for disqualification is attached hereto in the Appendix. The opinions of the Court of Appeal of the State of California affirming Petitioner's conviction and denying his motion to disqualify are not published in the official reporters. Those opinions are attached hereto in the Appendix.

JURISDICTION

On June 27, 1990, the Supreme Court of the State of California denied Petitioner's petition for review and request for disqualification of certain justices. On March 21, 1990, the Court of Appeal of the State of California affirmed Petitioner's conviction. On March 1, 1990, the Court of Appeal denied Petitioner's motion to disqualify certain justices.

PERTINENT CONSTITUTIONAL PROVISIONS

Amendment XIV, Section 1:

> . . . no state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On May 17, 1983 , Petitioner was charged by information in Orange County, California with one count of solicitation to commit murder, two counts of bribery, and one count of solicitation to commit perjury (Case No. C-51539). Petitioner pleaded not guilty to all four charges.

On April 12, 1984, Petitioner was charged by complaint with four counts of bribery (Case No. NF8400223). Specifically, the State charged Petitioner with the offense of "bribery to dissuade witness from attending" with respect to one Margaret Johnson, in violation of Section 136½ of the Penal Code of California. The complaint alleged that those four counts occurred on the following dates: between January 1 and February 26, 1983; on or about February 28, 1983; between March 1, 1983 and March 1, 1984; and on or about March 5, 1984. Petitioner pleaded not guilty to those four charges.

In June, 1987, Petitioner filed a complaint in the United States District Court for the Central District of California. Petitioner's complaint, *Krain* v. *Smallwood, et al.*, No. CV87-5387-TJH, lists Thomas Crosby and Malcolm Lucas as two of the

several named defendants. Petitioner's complaint seeks money damages and alleges violations of his federal civil rights, libel and slander, invasion of privacy, intentional infliction of emotional distress, and other claims.

On September 3, 1987, Petitioner filed another complaint, *Krain* v. *Brown, et al.*, No. CV87-5889, in the United States District Court for the Central District of California. Listed as a named defendant, among others, is Harmon Scoville. The prayer for money damages and allegations in this complaint are similar to those contained in the *Krain* v. *Smallwood* complaint.

On October 16, 1987, pursuant to a plea agreement, the State added a fifth count in Case No. NF8400223. That count charged Petitioner with soliciting another to join in the commission of subornation of perjury on February 28, 1983, in violation of Section 653f(a) of the California Penal Code. (R. 2261)* Petitioner pleaded guilty to that charge, and the district attorney's office dismissed the other four counts in Case No. NF8400223 and all four counts in Case No. C-51539. (R. 2755-83, 2892-99)

On November 13, 1987, Petitioner filed a request for certificate of probable cause for appeal. (R. 2828-40) On November 17, 1987, Petitioner filed another pleading that, as styled, included a motion to withdraw his plea, a motion to vacate judgment and stay sentence, and a *coram nobis* petition. (R. 2891-96) In both the November 13 and November 17, 1987 pleadings, Petitioner challenged his plea on the ground that the charge to which he pleaded guilty was barred by the three-year statute of limitations. (R. 2830-31, 2845)

On December 4, 1987, the trial court rejected Petitioner's statute of limitations challenge to his guilty plea on the grounds that his plea waived any claim that the charge was time-barred. (R. 2927, 2934-35) Notice of Appeal was timely filed on December 18, 1987. (R. 2939)

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* References to the Record on Appeal will be "R._____."

On July 8, 1988, Petitioner filed his brief in the California Court of Appeal, Fourth Appellate District. Petitioner argued, among other contentions, that his conviction must be reversed because he pleaded guilty to a charge barred by the statute of limitations.

On July 26, 1989, the United States Court of Appeals for the Ninth Circuit reversed the dismissal of *Krain v. Smallwood* and remanded the case to the United States District Court for the Central District of California for further proceedings. *See Krain* v. *Smallwood*, 880 F.2d 1119 (9th Cir. 1989). On December 8, 1989, the Ninth Circuit reversed the dismissal of *Krain* v. *Brown* and remanded that case to the United States District Court for the Central District of California for further proceedings. *See Krain v. Brown*, No. 89-55127, slip op. (9th Cir., Dec. 8, 1989).

On January 19, 1990, Petitioner filed a complaint, *Krain* v. *Kahn, et al.*, No. CV90-305-JMI, in the United States District Court for the Central District of California. The *Krain* v. *Kahn* lawsuit names as defendants, among others, Harmon Scoville, Malcolm Lucas, and Edward Panelli. On February 20, 1990, Petitioner filed a complaint, *Krain* v. *University of Michigan Hospital, et al.*, 90 C 972, in the United States District Court for the Northern District of Illinois; David Eagleson is among the named defendants. The prayers for money damages and allegations in the *Krain* v. *Kahn* and *Krain* v. *University of Michigan Hospital* lawsuits are similar to those in the *Krain* v. *Smallwood* and *Krain* v. *Brown* lawsuits.

On February 28, 1990, Petitioner filed in the California Court of Appeal, Fourth Appellate District, a motion to disqualify Justices Harmon Scoville, Thomas Crosby, and Gary Taylor from hearing Petitioner's appeal. With respect to Justices Crosby and Scoville, Petitioner based his motion on the grounds that Justices Crosby and Scoville were named defendants in lawsuits that Petitioner had filed, and that they therefore had an interest in the outcome of Petitioner's appeal. On March 1, 1990, the Court of Appeal denied Petitioner's motion to disqualify Justices Scoville, Crosby, and Taylor. (App. at A-8)

On March 21, 1990, the California Court of Appeals affirmed Petitioner's conviction. (App. at A-1—A-7) The Court of Appeals conceded that, on its face, the charge to which Petitioner pleaded guilty was barred by the statute of limitations in that "it was filed more than three years after the alleged commission of the offense." (App. at A-4) The Court of Appeal asserted, however, that "a defendant may waive a statute of limitations defense and plead to a time-barred charge in exchange for dismissal of viable counts." (App. at A-4) The Court of Appeal also conceded that the record did not show that Petitioner in fact waived the statute of limitations defense, but stated that "we must assume Krain waived the defense when he accepted the bargain." (App. at A-4)

On April 30, 1990, Petitioner asked the Supreme Court of the State of California to review the decision of the Court of Appeal. The petition for review raised two arguments: whether the trial court had jurisdiction to accept a guilty plea to a time-barred charge; and whether Petitioner's due process rights were violated by the Court of Appeal justices' refusal to recuse themselves. Petitioner also filed a request to disqualify Supreme Court Justices Malcolm Lucas, Edward Panelli, and David Eagleson based on their status as defendants in lawsuits filed by Petitioner. On June 27, 1990, the Supreme Court of the State of California denied Petitioner's petition for review and request for disqualification of certain justices. (App. at A-9)

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve The Conflict Between The Decisions Of The California Courts And Of This Court As To Whether A Judge, Who Is In Litigation With A Party Before Him, Violates Due Process By Not Recusing Himself

At the time a panel of the California Court of Appeal for the Fourth Appellate District affirmed Petitioner's conviction on March 21, 1990, two of the three justices on the panel had been

named defendants for over two years in lawsuits in which Petitioner was the plaintiff. At the time the Supreme Court of the State of California declined to review Petitioner's case on June 27, 1990, three of the justices of the California Supreme Court had been defendants for five months to three years in lawsuits filed by Petitioner. Petitioner's lawsuits against Court of Appeal Justices Crosby and Scoville were filed several months before Petitioner pleaded guilty and subsequently appealed to the Court of Appeal. Petitioner's lawsuits against the California Supreme Court justices were filed before the Court of Appeal affirmed Petitioner's conviction and he petitioned for review in the California Supreme Court. Thus, all of Petitioner's lawsuits against the justices were filed before those justices had jurisdiction over Petitioner's case.

As opposing parties in pending litigation, the five justices had a direct and personal interest in the outcome of Petitioner's appeal. The refusal of those five justices to recuse themselves from deciding Petitioner's appeal also created an appearance of partiality. The justices' actual interest in the outcome of Petitioner's case and the appearance of bias violated Petitioner's due process right to an impartial judiciary. The failure of the California Court of Appeal and the California Supreme Court to recognize and uphold Petitioner's due process rights flatly conflicts with numerous decisions of this Court. If allowed to stand, the California courts' decision in this case will create dangerous precedent that will allow judges to decide cases in which they have an interest in the outcome. Therefore, this Court should take the opportunity presented by Petitioner's case to resolve the conflict between the decisions of this Court and the decisions of the California courts and thereby reaffirm the due process rights of all litigants to have their cases decided by impartial tribunals.

Over six decades ago, this Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Tumey* v. *Ohio*, 273 U.S. 510,

523 (1927). In *Tumey*, the judge, who was also mayor, had an interest in the outcome of the case because his compensation derived in part from fines levied against persons he convicted. *See id.* at 522-23.

In *Ward* v. *Monroeville*, 409 U.S. 57 (1972), this Court also found a due process violation in a mayor serving as judge. Although the mayor's compensation did not depend on the levying of fines, the mayor's responsibility for village finances gave him an interest in whether fines were levied in the cases before him. *See* 409 U.S. at 60.

This Court also has found due process violations where the judge had an interest, albeit not a pecuniary one, in the outcome of a case before him. In *In re Murchison*, 349 U.S. 133 (1955), this Court held that a judge who had served as a "one-man grand jury" could not, consistent with the Due Process Clause of the Fourteenth Amendment, also convict a grand jury witness of a contempt charge that arose out of the witness' grand jury appearance. This Court stated that "no man is permitted to try cases where he has an interest in the outcome." *Id.* at 136. A judge's forbidden interest in a case exists in those circumstances that " 'offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused. . . .' " *Id.* (quoting *Tumey*, 273 U.S. at 532).

This Court most recently reaffirmed the due process right to an impartial tribunal in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986) and *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988). In *Lavoie*, a state supreme court justice voted to affirm an award of damages against Aetna at a time when he had pending litigation involving similar claims against other insurance companies. *See* 475 U.S. at 816-19. Although the state supreme court justice was not a party to the lawsuit between Lavoie and Aetna, this Court held that the justice's involvement in similar pending litigation gave him a direct interest in the outcome of the *Lavoie* case. *See id.* at 821-26.

In *Liljeberg*, a federal district court judge also served as a member of a university's board of trustees. 486 U.S. at 850. The

judge refused to recuse himself from hearing a case that, depending upon its outcome, would financially benefit the university. *See id.* at 852-57. Although this Court did not find that the judge had an actual bias, this Court held that the judge's relationship to the university created an appearance of bias. Thus, under Section 455(a) of Title 28, the judge was required to recuse himself because "an objective observer would have questioned [the judge's] impartiality." *See id.* at 861. In so holding, this Court reaffirmed the principle that the appearance of impartiality is a component of the due process right to a fair tribunal. *See id.* at 864-65 & n.12.

Against this backdrop of decisions of this Court, the violation of Petitioner's due process rights hardly could be more blatant. First, the two California Court of Appeal justices and three California Supreme Court justices had a direct, personal, substantial, and pecuniary interest in the outcome of Petitioner's appeal. Petitioner's lawsuits against the justices seek substantial money damages from all defendants and impose on the justices the usual time and financial burdens involved in defending a lawsuit. And, the outcome of Petitioner's appeal has a direct bearing on the success of his lawsuits against those same justices. For example, an affirmance of Petitioner's conviction makes him a convicted felon, which subjects him as a witness to impeachment under Rule 609 of the Federal Rules of Evidence. The five justices obviously have a greater likelihood of successfully defending the lawsuits against a convicted felon than against a person with no criminal convictions.

The five justices' pecuniary interest in Petitioner's case is at least as direct and substantial as was the case in *Tumey*, and is more direct than in *Ward*, *Murchison*, and *Lavoie*. Because this Court required recusal in those cases, the justices' more direct interest in Petitioner's case certainly should mandate their recusal here.

Second, the five justices likely have an actual bias against Petitioner because he sued them for money damages. At a minimum, the five justices should have been required to establish that

they had no actual bias against Petitioner, something they did not do.

Third, even if the five justices had no actual bias against Petitioner, their status as opposing parties in pending litigation created an undeniable appearance of partiality. If a judge's involvement in litigation against an insurance company who is not a party before him creates an appearance of bias, as this Court held in *Lavoie*, then certainly the involvement of judges in litigation with a party whose case *is* before them creates the appearance of a biased tribunal. If an appearance of bias exists when a judge is a trustee of a university that stands to benefit from the outcome of litigation before him, as this Court held in *Liljeberg*, then certainly an appearance of partiality exists in Petitioner's case where the judges themselves stand to benefit from affirmance of Petitioner's conviction.

Although Section 455(a) of Title 28 does not apply here, the standard contained therein clearly illuminates the due process violation present here. Any objective observer would reasonably question the impartiality of the five justices who are in litigation with Petitioner. As this Court has frequently stated, "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice." '" *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. at 825 (quoting *In re Murchison*, 349 U.S. at 136 (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954))). To allow Petitioner's conviction to stand affirmed by judges who are themselves in litigation with Petitioner would be an affront to the appearance of justice and to the Due Process Clause. This Court should grant Petitioner's writ and prevent any further insult to a litigant's right to an impartial tribunal.

II. This Court Should Decide The Important Federal Question Of Whether Due Process Disallows A Guilty Plea To A Charge Barred By A Statute Of Limitations That Is Itself Jurisdictional

The California Court of Appeal conceded that Petitioner pleaded guilty to a charge that, on its face, was barred by the statute of limitations. The Court stated, however, that a person may waive a statute of limitations defense by pleading guilty. The Court then assumed that Petitioner waived the statute of limitations defense, although nothing in the record indicated such a waiver.

The Court of Appeal cited no cases to support its assertion that a defendant may waive by pleading guilty a statute of limitations defense. In fact, decisions of the Supreme Court of the State of California specifically reject the conclusion of the Court of Appeal. Moreover, decisions of this Court implicitly affirm, although without deciding, the proposition that, where a statute of limitations is jurisdictional, due process does not allow a waiver by guilty plea of a statute of limitations defense. This Court should take the opportunity presented by Petitioner's case to decide the important federal question of whether due process allows a waiver of a jurisdictional statute of limitations.

It is the undisputed law in California that the statute of limitations is jurisdictional. In *People* v. *Chadd*, 28 Cal.3d 739, 756-57, 621 P.2d 837, 847, 170 Cal.Rptr. 798, 808 (1981) (emphasis in original), the California Supreme Court, quoting from *People* v. *McGee*, 1 Cal.2d 611, 613-14, 36 P.2d 378 (1934), stated:

> The Court then squarely held that "the more desirable rule is that the statute is jurisdictional," and drew the conclusion that "The point may therefore be raised at any time, before *or after* judgment." . . . In criminal cases, the state, through its legislature, has declared that it will not prosecute crimes after the period has run, and hence has limited *the power of the courts to proceed* in the matter." . . . The corollary was equally

> clear: "It follows that where the pleading of the statute shows that the period of the statute of limitations has run . . . the power to proceed in the case is gone."

It is equally well-settled law in California that, because the statute of limitations is jurisdictional, it may not be waived by a defendant. In *Chadd*, the Court continued:

> In a recent discussion of the matter we reiterated that in criminal cases "in California the statute of limitations constitutes a substantive rather than a procedural right which is not waived by failure to assert it at the pleading state. . . . [I]t is now well settled that a conviction, even if based on a plea of guilty, is subject to collateral [or direct] attack if the charge was originally barred by the applicable limitation period. . . . The rule is a reflection of the fundamental principle of our law that "the power of the courts to proceed"—i.e., their jurisdiction over the subject matter—cannot be conferred by the mere act of a litigant, whether it amount to consent, waiver, or estoppel. . . .

People v. Chadd, 28 Cal.3d at 757, 621 P.2d at 847-48, 170 Cal. Rptr. at 808-09 (quoting *People* v. *Zamora*, 18 Cal.3d 538, 547, 557 P.2d 75, 134 Cal. Rptr. 784 (1976) and *Summers* v. *Superior Court*, 53 Cal. 2d 295, 298, 347 P.2d 668, 1 Cal.Rptr. 324 (1959)). As the Court in *Chadd* made plain, even a defendant's guilty plea cannot waive the statute of limitations. In Petitioner's case, the California courts unmistakably and inexplicably failed to follow established California law.

Although this Court has not specifically considered the power of a defendant to waive by guilty plea a statute of limitations defense, this Court's discussion of the effect of guilty pleas is entirely consistent with the law in California. In *United States* v. *Broce*, 109 S.Ct. 757, 762 (1989) (emphasis added), this Court stated:

> A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to

> sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counselled and voluntary. . . . *There are exceptions where on the face of the record the court has no power to enter the conviction or impose the sentence.*

In *Broce*, this Court explained that a guilty plea would not waive a defendant's challenge to his conviction where "the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all." *Id.* at 765. Because the California courts view a statute of limitations as denying the State's power to bring any charges at all, this Court has implicitly approved the law that governs in California but was not applied in Petitioner's case.

Decisions in this Court also make clear that allowing Petitioner to plead guilty to a time-barred charge denies him due process. In *Blackledge* v. *Perry*, 417 U.S. 21, 30-31 (1974), this Court emphasized that, under some circumstances, a defendant has "the right not to be haled into court at all. . . . The very initiation of the proceedings against him . . . thus operate[s] to deny him due process of law."

In Petitioner's case, once the State of California decided that a statute of limitations is jurisdictional and may not be waived, due process requires that the State apply that law to all defendants. The failure of the California courts to apply its own law in Petitioner's case denied Petitioner his due process rights under the Fourteenth Amendment. Because Petitioner's case presents an important federal due process question and because the decisions of the California courts in Petitioner's case conflict with decisions of this Court, this Court should grant Petitioner's writ to decide that question and resolve the conflict.

CONCLUSION

Wherefore, Petitioner respectfully prays that this Honorable Court grant this Petition and issue a writ of certiorari to review the judgment of the Supreme Court of the State of California.

Respectfully submitted,

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_____

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APPENDIX

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,	G006122 G006520 G006788
Plaintiff and Respondent,	
v.	(Super Ct. Nos. C-62437, C-51539)
LAWRENCE S. KRAIN,	
Defendant and Appellant.	O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Theodore Millard and Richard Weatherspoon, Judges. Affirmed.

Lawrence S. Krain, in pro. per., and Corinne S. Shulman, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Richard B. Iglehart, Chief Assistant Attorney General, Harley D. Mayfield, Senior Assistant Attorney General, Janelle B. Davis and Jeffrey J. Koch, Deputy Attorneys General, for Plaintiff and Respondent.

• • •

Lawrence Krain pleaded guilty to solicitation of another to join in the subornation of perjury and was placed on probation for two years. In these consolidated appeals, he argues the solicitation charge was barred by the statute of limitations and the trial court failed to determine his competency to enter a guilty plea and erred in denying his motion to withdraw the plea. He also complains of the failure to order and consider a probation report. We affirm.

I

Krain's attempts to influence the testimony in a grand theft/Medi-Cal fraud proceeding (OCSC No. C-50403) led to the filing of numerous charges.[1] Lengthy plea bargaining negotiations ensued, and the superior court ordered all charges against Krain consolidated pending the outcome of a competency hearing. (Pen. Code, §1368.) Krain was initially found incompetent and committed for treatment.

In a subsequent hearing, however, the superior court determined he was competent and remanded one matter to the municipal court for a preliminary hearing (No. C-62437). These proceedings were interrupted for yet another competency hearing. Similar hearings were quickly initiated in the remaining cases (Nos. C-50403, C-51539).

A jury agreed Krain was competent to stand trial (No. C-50403); but the court granted a defense motion for judgment notwithstanding the verdict and dismissed the case, we are told, in the interests of justice. Krain then sought stay orders in the remaining prosecutions based on the incompetency finding. Detailed psychiatric reports documenting a long-standing diagnosis of paranoid schizophrenia were filed in support of the motions, but the trial court declined to issue a stay. In a later competency hearing, a jury confirmed Krain was then competent to stand trial. He eventually pleaded guilty to the recently added solicitation charge. (See fn. 2.)

No one requested a probation report. Pursuant to the plea bargain, Krain was placed on two years' probation on the condition he spend one year in the Brea Neuro-Psychiatric Hospital.

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[1] An information charged Krain with solicitation to commit murder, two counts of bribery of a witness, and solicitation to commit perjury (OCSC No. C-51539). By complaint he was also charged with four counts of bribery (OCSC No. C-62437). That pleading was amended by interlineation to charge the crime Krain pleaded guilty to.

Defendant nevertheless made motions to withdraw the guilty plea and for permission to represent himself at trial. He withdrew the motion before obtaining a ruling from the court.

Krain filed a second motion to withdraw his plea and to "correct error coram nobis." The court denied both motions. Krain sought a certificate of probable cause (Pen. Code, §1237.5). The trial court declined to issue one, finding Defendant's request did not set forth "reasonable Constitutional, jurisdictional, or other grounds going to the legality of the proceedings."[2]

II

Krain maintains prosecution of the solicitation charge was barred by the three-year statute of limitations. Perhaps, but on this record we must assume Krain waived the defense.

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[2] Krain's petition for a writ of mandate to review the denial of the certificate (G006788) was consolidated with the appeals from the judgment (G006122) and a postjudgment order suspending the preparation of a reporter's transcript of the competency hearing (G006520).

We reject the Attorney General's assertion that Krain's failure to obtain a certificate of probable cause precludes appellate review of these issues. While former Penal Code section 1237.5 did bar an appeal from a guilty plea unless the trial judge filed a "certificate of probable cause" (see also Cal. Rules of Court, rule 31(d)), that section was amended in 1988 (stats. 1988, ch. 851, §1); and the revised statute, operative until January 1, 1992, no longer requires a certificate of probable cause to appeal after a guilty plea. Section 1237.5 "relates only to the '*procedure* in perfecting an appeal from a judgment based on a plea of guilty' " (*People* v. *DeVaughn* (1977) 18 Cal.3d 889, 896, emphasis added); accordingly, the new provisions apply retroactively to this appeal. The written declaration Krain submitted satisfies the current version of section 1237.5. No more is required.

The original complaint charged Krain with four counts of bribery of one Margaret Johnson. On October 23, 1987, the complaint was amended by interlineation to add a fifth count charging solicitation of "another" to join in the commission of subornation of perjury "occurring on February 28, 1983." On its face, the charge *is* barred; i.e., it was filed more than three years after the alleged commission of the offense. It is well settled that if " 'the pleading . . . shows [on its face] that the period of the statute of limitations has run, and nothing is alleged to take the case out of the statute . . . the power to proceed in the case is gone.' " (*People* v. *Padfield* (1982) 136 Cal.App.3d 218, 226.)

But Krain did not file a demurrer or otherwise attack the amended pleading, and a defendant may waive a statute of limitations defense and plead to a time-barred charge in exchange for dismissal of viable counts. The record does not reflect whether this was in fact what occurred here. For the purposes of appeal, however, we must assume Krain waived the defense when he accepted the bargain. It is an appellant's obligation to supply an adequate record. Also, if waiver were not presumed, a difficult burden would fall on the trial courts: No judge could accept a plea pursuant to a bargain without first requiring the defendant to waive all conceivable defenses to the charges.

If Krain did not knowingly waive a statute of limitations defense, where one was without question available, and wishes to set aside the agreement, the matter should be raised in the superior court in the first instance via petitions in coram nobis or habeas corpus. There a factual record can be developed with respect to the issues of waiver and the viability of a potential defense based on the statute of limitations, and the dismissed charges and cases can be reinstituted if the plea bargain is set aside.

III

Krain next complains the trial court ignored substantial evidence of his mental instability and should not have accepted his guilty plea without another competency hearing. A line of

federal authority does suggest the trial court must reassess competency to enter a guilty plea even after a defendant has been found capable of standing trial. (*Sieling* v. *Eyman* (9th Cir. 1973) 478 F.2d 211; *Schoeller* v. *Dunbar* (9th Cir. 1970) 423 F.2d 1183.) But *Sieling* does not represent the unanimous view of the Ninth Circuit (see e.g., *De Kaplany* v. *Enomoto* (9th Cir. 1976) 540 F.2d 975, 987, 988) and is not binding on this court.

Under California law a competency hearing is only required upon a "prima facie showing of mental incompetence." (*People* v. *Samuel* (1981) 29 Cal.3d 489, 495.) The proceeding is "mandatory when 'substantial' evidence of the accused's incompetence has been introduced." (*People* v. *Deere* (1985) 41 Cal.3d 353, 358, disapproved on another point in *People* v. *Bloom* (1989) 48 Cal.3d 1194, 1228; see *People* v. *Lang* (1989) 49 Cal.3d 991, 1030.) Nevertheless, "[e]vidence that merely raises a suspicion that the defendant lacks present sanity or competence but does not disclose a present inability because of mental illness to participate rationally in the trial is not deemed 'substantial' evidence requiring a competency hearing. [Citations.] . . . '[M]ore is required to raise a doubt [of competence] than mere bizarre actions [citation] or bizarre statements [citation] . . . or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense [citation].' " (*People* v. *Deere, supra*, 41 Cal.3d at p. 358.)

Defense counsel stated his client was capable of entering the plea, and Krain insisted this was true. The court did not express any doubt as to Krain's competency at the time of the plea and found the waivers to be "voluntary, intelligent, knowing and express." The court noted Krain had been "under observation throughout the . . . taking of the plea. He expressed interest, understanding and was alert and capable of responding independently with additional information that was not solicited by Counsel which indicated an exceptional understanding of the nature of the plea." The judge added, "Dr. Krain was intimately involved in the negotiations of the plea. [¶] His understandings and expressions that have been taken during the course of the

voir dire would indicate that it is true that he was intimately involved and has a complete understanding of every aspect in detail as of the items read to him as indicated by his insistance [*sic*] that each reference to any part of the plea incorporated the whole." We conclude any competency hearing before acceptance of the guilty plea was not indicated here.

IV

Krain contends the trial court erred in denying his motions to withdraw his guilty plea. But the record reveals he voluntarily withdrew the first motion before the court issued a ruling and his next effort was filed after judgment was entered. A guilty plea may be withdrawn *before* judgment on a showing of good cause. Once judgment is entered, the trial court loses jurisdiction to hear the issue. (Pen. Code, §1018; see Pen. Code, §859a.) Krain has no cause for complaint on this score.

V

Krain also challenges the trial court's failure to order and consider a probation report before imposing sentence pursuant to the plea bargain. Again, we disagree.

Penal Code section 1203, subdivision (b) states, "In every case in which a person . . . is eligible for probation, before judgment is pronounced, the court shall immediately refer the matter to the probation officer to investigate and report to the court, at a specified time, upon the circumstances surrounding the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment."

Pursuant to the terms of the plea bargain, Krain agreed to plead guilty to the charge of solicitation of another to join in the subornation of perjury and to accept two years probation on the condition he spend one year in the Brea Neuro-Psychiatric Institute. Krain did not request a probation report nor did he object to the court proceeding without one. And, given the terms of the

plea bargain, Krain could have derived no real benefit from a probation report. The court was not confronted with any discretionary decision at sentencing. By his silence, Krain effectively waived the right to complain of the absence of the probation report on appeal. (See *People* v. *Webb* (1986) 186 Cal.App.3d 401, 408; *People* v. *Tempelis* (1964) 230 Cal.App.2d 596, 599-602.)

Judgment affirmed.

Crosby, J.

We concur:

Scoville, P.J.

Taylor, (Samuel) J.*

*Assigned by the Chairperson of the Judicial Council.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* *v.* LAWRENCE S. KRAIN, et al., *Defendants and Appellants.*	O R D E R G006520 (Super Ct. Nos. C-62437, C-51539 and C-62437)

THE COURT:*

Appellant's motion to disqualify Justices Scoville, Crosby and Judge Gary Taylor is DENIED. Appellant's motion to proceed in pro per is DENIED.

SCOVILLE, Presiding Justice

* Before Scoville, P.J., Crosby, J. and Taylor (Samuel), J. *

** Judge, Orange County Superior Court, assigned by the Chairperson of the Judicial Council.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division Three,
No. G006788/G006122/G006520
S009502

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, *Respondent*

v.

LAWRENCE S. KRAIN, *Appellant*

And Companion Case

Petitions for review and request for disqualification of certain justices DENIED.

Acting Chief Justice